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CHARLES ELMORE CROPLEY
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No. 559

IN THE

Supreme Court of the United States

October Term 1948

AMERICAN FIDELITY & CASUALTY CO., INCORPORATED and A. CIMPI EXPRESS LINES, INC.,

Plaintiffs-Respondents

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

JOSEPH CARNICELLI, SEYMOUR WOLFSON by SADIE WOLFSON, as Guardiar ad Litem, SADIE WOLFSON, GLORIA WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SAMUEL GREEN, JUNICE GREEN, by SAMUEL GREEN, her Guardian ad Litem, MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits of ELEANOR GULLBERG, deceased, EDWIN L. WOLF, as Administrator of the Goods, Chattels and Credits of RICHARD FRED WOLF, deceased, WILLIS H. GOLDSMITH, as Administrator of the Goods, Chattels and Credits of BETTY MARIE GOLDSMITH, deceased, CLYDE E. BUTLER, as Administrator of HARRY EDWIN BUTLER, deceased, WILLIAM HERBERT, EARL SHOEMAKER, JOSIAH BETHARDS, GEORGE F. LOKER, as Guardian ad Litem of BEATRICE CAROLINE LOKER, GEORGE F. LOKER, JEAN ELIZABETH MATTHEWS, an infant by ETTA H. MATTHEWS, her Guardian ad Litem, and ETTA H. MATTHEWS, BEATRICE KANDEL, an infant by JUDAH KANDEL, her guardian ad Litem and JUDITH KANDEL, MARY LOU JORGENSON, an infant by FREDERICK E. JORGENSEN, ESTATE OF DOUGLAS P. WINTERBOURNE, deceased, ESTATE OF JEANNE COSGROVE, deceased, and the following infants, JAMES PRENTICE, RICHARD PHLEGING, ALBERT HANSEN, MADELINE DEPUY, SHIRLEY WISEMAN, RICHARD DONNELLY, MARY JOHNSON, GEORGE McPHILLIPS, LEE HASSAN, AUDREY STILLER, WILLIAM MARSHALL and RICHARD HANSEN,

Defendants.

MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits which were of Eleanor Gullberg, deceased,

Plaintiff-Respondent

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

GEORGE R. FEARON,
Attorney for Petitioners,
930 University Building,
Syracuse, New York.

F. N. SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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Plaintiff-Respondent

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

George R. Fearon, Esq., on behalf of New Amsterdam Casualty Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled actions on October 22, 1948, and the order of said Court denying petitioner's motion for reargument thereof entered on November 24, 1948.

Opinions Below.

The opinion of Hon. M. B. Patterson, Trial Judge (Fols. 463-497) was not officially reported. There was no opinion on the part of the majority of the Court in the Appellate Division, but the decision, with the dissenting opinion of Mr. Justice Hagerty (Fols. 1289-1318), is reported at *272 App. Div. 1054.* No opinion was written by the Court of Appeals, but its decision with the digest prepared by the State Reporter is reported at *298 N. Y. 693.*

Jurisdiction.

The jurisdiction of this Court to review this decision is derived from Section 1258 of the Judicial Code as revised, wherein final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by this Court.

The case involves interpretation of Article 1, Section 8, Clause 3, of the Constitution of the United States (the Interstate Commerce Clause); of Section 215 of the Interstate Commerce Act (49 USCA, §315), and of Section 63-r of Article 3-B of the Public Service Law of the State of New York.

The decision which petitioner seeks to have reviewed was handed down by the Court of Appeals of the State of New York on October 22nd, 1948.

Statement.

These cases were tried together without a jury before Hon. Mortimer B. Patterson in Supreme Court, County of Orange, on October 9-11, 1944, and judgments and orders adverse to petitioner were thereafter granted and entered herein (Fols. 498-503, 248-252). These judgments and orders were affirmed by a decision of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department on November 3rd, 1947, and by the Court of Appeals on October 22, 1948. A motion for reargument or for amendment of the remittitur of the Court of Appeals was denied by that Court by an order entered November 24, 1948.

The facts leading up to this petition may be briefly stated as follows:

On September 25, 1942, a tractor-trailer combination operated by A. Cimpi Express Lines, Inc., carrying a load between Newark, N. J., and Sampson, New York (Fols. 221, 436), collided with a horse-drawn haywagon carrying a group of young people, at a point about two miles west of Goshen, New York (Fols. 899-901), resulting in death and serious injury to a number of passengers in the haywagon.

Subsequently twenty-five of these persons and representatives of those who had been killed obtained final judgments against A. Cimpi Express Lines, Inc., totaling $157,072.63 (Fols. 216-220; 431-435).

Two cases are involved on this petition. The first is the Gullberg case, stipulated to be a test case decisive of all others of like tenor, brought on behalf of the administrator of one of the deceased passengers in the role of an

unpaid judgment creditor under Section 167 of the Insurance Law of the State of New York against petitioner as the alleged insurer of A. Cimpi Express Lines, Inc. (Fols. 1234-1267). The second is a declaratory judgment action commenced by A. Cimpi Express Lines, Inc., and American Fidelity & Casualty Co., Incorporated, the other insurer involved (which has since been permitted to discontinue), against petitioner to determine the extent of the latter's liability. These cases, involving the determination of a single identical proposition of law, have been consolidated for purposes of trial and appeal.

Petitioner, New Amsterdam Casualty Company, for the reasons hereinafter stated, duly advised A. Cimpi Express Lines, Inc., that it disclaimed liability under its policy. (Ex. 11, Fols. 1037, 1038.)

The basic facts underlying petitioner's disclaimer of liability and the basis for the petition herein are as follows:

The petitioner's policy of insurance (Ex. 1) in an amount in excess of the minimum requirements of the Public Service Commission of the State of New York was issued to one William P. Biss, the owner and operator at that time of a single tractor and a single trailer, engaged solely in intrastate commerce within the State of New York (Fols. 770, 771) pursuant to a certificate of the Public Service Commission of that State (Fol. 769). This policy contained the following exclusion (Vol. II, Fols. 39-40):

"EXCLUSIONS

THIS POLICY DOES NOT APPLY:

(a) * * *

(b) * * * while any trailer covered by this policy is used with any automobile owned or hired by the named insured and not covered by like insurance in the company; * * * "

A certificate of this policy (Form 4), as required by the Public Service Law of the State of New York, was filed with the Public Service Commission by petitioner on behalf of Biss (Vol. II, Fols. 81-87), and an endorsement (Form 6) was added to the policy (Vol. II, Fols. 65-75).

Biss thereafter sold the tractor and trailer to A. Cimpi Express Lines, Inc. (Fol. 772), a carrier engaged both in intrastate and interstate commerce, having duly issued certificates already in force, both from the Public Service Commission of the State of New York (Ex. 4), and from the Interstate Commerce Commission (Ex. C), and having filed as prerequisite to the obtaining of each of these certificates a certificate of insurance in another insurer in the required amount specified by each of these Commissions (Ex. B) (Vol. II, Fols. 325-335, 342-348).

The accident in question occurred at a time when the trailer insured by petitioner was being used with a tractor "not covered by like insurance in this company" (Fols. 214, 215, 429, 430).

The crux of this case, therefore, is whether or not petitioner's policy of insurance constituted a "required policy" for A. Cimpi Express Lines, Inc., under the Public Service Law of the State of New York, at the time of the accident. If it was such a "required policy", the above quoted exclusion was rendered inapplicable by the statute. If, as petitioner contends, it was not such a "required pol-

icy'' at that time, the exclusion would be effective and no liability could be imposed upon petitioner.

Since the vehicle was at the time of the accident engaged in an interstate operation under a certificate for which the operator had filed required insurance with the Interstate Commerce Commission, the courts of New York State are in effect holding that that State can require of an interstate carrier engaged in an interstate operation insurance in addition to that deemed adequate by the Interstate Commerce Commission pursuant to the authority granted to it under Section 215 of the Motor Carriers Act of 1935.

Petitioner had issued this policy to cover a specific risk, to wit, the operation of one specified tractor and one specified trailer by William P. Biss in intrastate operations under the jurisdiction of the Public Service Commission of the State of New York. It filed a certificate of its policy with that Commission in order that Biss might procure and maintain his permit for such operations. When Biss sold the tractor and trailer to Cimpi, petitioner endorsed Cimpi's name on the policy. It filed no further certificates (Fols. 1006, 1007, 1173). It charged no additional premium. Petitioner has contended throughout this case that the policy never became a required policy for Cimpi, even in intrastate operations. The adverse decision of the Court of Appeals of the State of New York on that point is, of course, not reviewable by this Court.

It is the further question of whether or not this policy can be a state required policy at a time when the carrier was engaged in an interstate operation, also decided adversely to petitioner by the New York Court of Appeals, that petitioner seeks to have reviewed by this Court.

The Question Presented

Can the State of New York require of an interstate carrier engaged in an interstate operation, liability insurance in addition to that required by the Interstate Commerce Commission as a prerequisite to the issuance of its certificate to the interstate carrier?

Statutes and Regulations Involved

New York State Public Service Law

§63-r. SECURITY FOR THE PROTECTION OF THE PUBLIC

No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the commission may require, conditioned to pay within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries or death resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others. The commission may, in its discretion and under such rules and regulations as it shall prescribe, require any such common carrier to file surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements in a sum to be determined by the commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all prop-

erty belonging to shippers and/or consignees, and coming into the possession of such carrier in connection with its transportation service. Any carrier which may be required by law to compensate a shipper and/or consignee for any loss, damage, or default for which a connecting motor carrier is legally responsible shall be subrogated to the rights of such shipper and/or consignee under any such bond, policies of insurance, or other securities or agreements, to the extent of the sum so paid.

State of New York
DEPARTMENT OF PUBLIC SERVICE
State Division

Insurance Requirements for Truck Operators and Brokers

(as issued October 4, 1938)

1. *Common and Contract Carriers:*

Every motor carrier transporting property for compensation shall secure and maintain and file with this Commission a corporate bond or policy of insurance in a company authorized to do business in this State by the Superintendent of Insurance, or in lieu thereof may file a certificate as provided by General Requirements F and G hereof, covering each motor vehicle so to be operated for the sums hereinafter set forth, conditioned for the payment of all judgments recovered against such motor carrier:

	Minimum Liability
For damages for and incident to death or injuries to one person	$ 5,000
For damages for and incident to death or injuries to two or more persons arising out of the same accident	10,000
For damages for and incident to injuries to or destruction of property—each accident	1,000
For loss or damage to property carried in one motor vehicle	1,000

* * * * *

3. *General Requirements:*

(a) Every bond or policy of insurance shall contain a provision for a continuing liability notwithstanding any recovery thereunder.

(b) Every bond or policy of insurance shall provide that the cancellation thereof shall not be effective unless at least twenty days' notice in writing of intention to cancel has been delivered to the Commission; such cancellation notice shall be in the form hereto attached and marked "Form 1"—Liability Insurance; "Form 2"—Cargo Insurance. If such canceled policy is reinstated notice of reinstatement shall be in the form hereto attached and marked "Form 3."

(c) All renewal policies or bonds shall be filed with the Commission at least twenty days prior to expiration of current coverage.

(d) A tractor or truck, when coupled to a trailer or semi-trailer, shall be regarded as one vehicle.

(e) The Commission will consider applications for permission to establish insurance funds in lieu of filing bonds or policies of insurance. Until such authority is granted bonds or policies of insurance, or certificates evidencing insurance, must be filed. No motor carrier or broker will be exempted from filing evidence or insurance.

(f) In lieu of a bond or policy of insurance, operators may file a certificate evidencing such insurance. The certificate shall be in the form hereto attached and marked "Form 4"—Liability Insurance; "Form 5"—Cargo Insurance.

(g) When a certificate of insurance is filed as provided in requirement (f), there shall be attached to the bond or policy of insurance, an endorsement in the form hereto attached and marked "Form 6"—Liability Insurance; "Form 7"—Cargo Insurance.

(h) When a bond is filed in lieu of a policy of insurance or a certificate evidencing insurance, the bond shall be in the form hereto attached and marked "Form 8"—Motor Carrier Bodily Injury and Property Damage Liability; "Form 9"—Cargo Liability; "Form 10"—Brokers' Surety.

Motor Carrier Act of 1935, §215
(49 USCA, §315)

Security for Protection of Public

No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such cerificate or permit, or for loss or damage to property of others. The Commission may, in its discretion and under such rules and regulations as it shall prescribe, require any such common carrier to file a surety bond, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in a sum to be determined by the Commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all property belonging to shippers and/or consignees and coming into the possession of such carrier in connection with its transportation service. Any carrier which may be required by law to compensate a shipper and/or consignee for any loss, damage, or default for which a connecting motor common carrier is legally responsible shall be subrogated to the rights

of such shipper and/or consignee under any such bond, policies of insurance, or other securities or agreements, to the extent of the sum so paid.

INTERSTATE COMMERCE COMMISSION

Rules and Regulations

Rule I

No motor carrier subject to the provisions of the Motor Carrier Act, 1935, shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to a motor carrier, or shall remain in force unless and until there shall have been filed with and approved by the Commission a surety bond, policy of insurance (or certificate of insurance in lieu thereof), qualifications as a self-insurer, or other securities or agreements in not less than the amounts hereinafter prescribed, conditioned to pay, within the amount of such surety bond, policy of insurance (or certificate of insurance in lieu thereof), qualifications as a self-insurer, or other securities or agreements any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others; nor shall any common carrier by motor vehicle subject to the provisions of said Act engage in interstate or foreign commerce, nor shall any certificate be issued to such carrier, nor remain in force unless and until there shall have been filed with and approved by the Commission a surety bond, policy of insurance (or certificate of insurance in lieu thereof), qualifications as a self-in-

surer, or other securities or agreements in not less than the amounts hereinafter prescribed, conditioned upon such carrier making compensation to shippers or consignees for all property belonging to shippers or consignees and coming into the possession of such carrier in connection with its transportation service.

Rule II

The minimum amounts referred to in Rule I are hereby prescribed as follows:

A. Motor carriers—bodily injury liability—property damage liability

(1) Kind of equipment	(2) Limit for bodily injuries to or death of one person	(3) Limit for bodily injuries to or death of all persons injured or killed in any one accident (subject to a maximum of $5,000 for bodily injuries to or death of one person)	(4) Limit for loss or damage in any one accident to property of others (excluding cargo)
Passenger equipment (seating capacity):			
7 passengers or less	$5,000	$15,000	$1,000
8 to 12 passengers, inclusive	5,000	20,000	1,000
13 to 20 passengers, inclusive	5,000	30,000	1,000
21 to 30 passengers, inclusive	5,000	40,000	1,000
31 passengers or more	5,000	50,000	1,000
Freight equipment: All motor vehicles used in the transportation of property	5,000	10,000	1,000

B. * * * *

Rule III

The following combinations will be regarded as one motor vehicle for the purposes of these rules, (1) a tractor and trailer or semi-trailer when the tractor is engaged solely in drawing the trailer or semi-trailer, and (2) a truck and trailer when both together bear a single load.

Specifications of Errors to be Urged

The Court of Appeals of the State of New York erred:

(1) In affirming the refusal of the Trial Judge to find as a conclusion of law that A. Cimpi Express Lines, Inc., was engaged in interstate commerce at the time of the accident.

(2) In holding that petitioner's policy of liability insurance could be a required policy for a motor carrier under the Public Service Law of the State of New York at a time when such carrier was engaged in an interstate operation, subject to the jurisdiction and pursuant to the authority of the Interstate Commerce Commission.

(3) In holding that the Public Service Commission of the State of New York can require of an interstate motor carrier engaged in an interstate operation insurance in excess of that specified by the Interstate Commerce Commission.

(4) In affirming the decision of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department.

Reasons Relied Upon for Writ

The Court of Appeals of the State of New York has decided adversely to petitioner a federal question of substance not heretofore determined by this Court.

This case involves more than the mere question of whether or not petitioner's policy of liability insurance covered the operations of A. Cimpi Express Lines, Inc., at the time of the accident, and therefore whether or not petitioner is liable to pay the judgments recovered against Cimpi to the extent of its policy limits.

It is fraught with dangers which, if the decision of the Court of Appeals of the State of New York is permitted to stand, may well impair the regulatory powers of the United States over interstate commerce granted by the Constitution of the United States.

In reaching the conclusion that petitioner's policy was applicable and that petitioner was liable, the courts of the State of New York have necessarily decided this larger and more far reaching question of federal import. The Trial Judge commented specifically on the point but decided it adversely to petitioner, upon the authority of *Maurer v. Hamilton*, 309 U. S. 598, hereinafter shown to be distinguishable (Fols. 480-485). Neither appellate court wrote an opinion, but it is implicit in their decisions that they have held the Public Service Commission of the State of New York to have the power to impose insurance requirements upon this interstate motor carrier over and above the insurance requirements specifically prescribed by the Interstate Commerce Commission and therefore that the paramount jurisdiction of the United States Government

over interstate commerce granted by Section 8, Article I of the Constitution of the United States may be infringed upon to this extent by a state.

The granting of this petition by this Court will in no way conflict with its decision in *Lynch v. New York*, 293 U. S. 52, or its decision in *McGoldrick v. Gulf Oil Corporation*, 309 U. S. 2, 414. In fact, the petition herein is presented in accordance with the rules laid down in those cases.

In *Lynch v. New York*, supra, this Court stated that it must appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

We have stated above the federal question presented. From the record it appears that this question was not new to the case in the Court of Appeals. It was raised in petitioner's answer (Fols. 99-107; 324-329). It was presented in its trial brief and commented upon by the trial court (Fols. 480-485). It was offered by petitioner in its requested findings of fact and conclusions of law (Fols. 236, 237, 239-241, 451, 454-455), and again in its briefs, both to the Appellate Division of the Supreme Court and the Court of Appeals.

These courts could not have decided the case adversely to petitioner without casting aside all the defenses raised by petitioner. One of those defenses was the involvement in interstate commerce outlined in detail above.

This case presents the reverse of the situation in *McGoldrick v. Gulf Oil Corporation*, supra, in that there the decision as rendered in favor of the protesting taxpayer could have rested upon an adequate non-federal ground as well as upon the federal ground stated. Conversely, a decision in favor of the comptroller in that case would necessarily have involved the rejection of the taxpayer's contention that the tax involved constituted an illegal interference with and a burden upon foreign commerce.

In the instant case, a decision in favor of petitioner could have been sustained on purely state grounds, independent of the federal question here presented, but the decision against petitioner could not have been reached without dismissing its defense based upon the federal ground stated.

That petitioner's request for an amendment of the remittitur to the Court of Appeals of the State of New York to specifically state the federal question was denied certainly cannot be held to preclude the petitioner from obtaining a review of that decision by this Court. It would indeed be an anomalous situation if a state court could, by failing to write an opinion and by thereafter refusing to specifically state a federal question as clearly presented by the record as is this, prevent this court from reviewing its decision.

As to the merits of petitioner's case, it is a well established rule of law that the jurisdiction of the Federal Government over interstate commerce is paramount; that when Congress speaks on any phase thereof, no state can direct to the contrary. (*New York Central Railroad Co. v. Winfield*, 244 U. S. 147, 148, and cases cited there.) This is a

case in which Congress has spoken on the particular phase of interstate commerce concerned.

That interstate commerce is involved is clear, despite the fact that the Trial Judge refused to so find at petitioner's request. He found as a fact that the tractor-trailer combination involved was en route from Newark, New Jersey, to Sampson, New York. That in itself necessitates a determination that the carrier was engaged in interstate commerce. But further, even though there was some debate at to whether any part of the load was picked up at Newark, N. J., or whether on the other hand the carrier was merely transporting a load picked up in Brooklyn, N. Y., to Sampson, N. Y., on a route through New Jersey, interstate commerce was definitely involved, as this Court so ably stated most recently in *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653, an appeal from this same Court of Appeals of the State of New York, when it said:

> "It is too late in the day to deny that transportation which leaves a State and enters another State is 'commerce * * * among the several states' simply because the points from and to are in the same state."

Maurer v. Hamilton, 309 U. S. 598, does not conflict with the decision sought by petitioner herein. There this Court was called upon to determine the constitutionality of the Pennsylvania statute prohibiting the carrying of any other vehicle "above the cab of the carrier involved" as applied to an interstate transporter of motor vehicles. This Court held that such a regulation could be legally imposed upon interstate as well as intrastate carriers, but this Court was careful to point out that upon this particular topic,

namely, whether or not carrying a vehicle over the cab of a transporter vehicle, constituted a danger to the public safety had not been ruled upon by Congress or by the Interstate Commerce Commission. On the contrary, this Court stated that Congress had merely authorized an investigation by the Interstate Commerce Commission into the propriety of issuing safety regulations in this regard. Consequently, the decision of this Court in that case rested upon its conclusion that Congress had not spoken upon the particular phase of the interstate commerce involved and that until it did, the State regulation might legally be applied.

The appellate courts of several states have held their states powerless to impose upon an interstate carrier insurance requirements in addition to or different from those prescribed by the Interstate Commerce Commission, once Congress through the Interstate Commerce Commission had prescribed such requirements. (*University Overland Express, Inc. v. Alsop*, 122 Conn. 275, 189 A. 458; *University Overland Express, Inc. v. Griffin*, 89 N. H. 395, 200 A. 390; *Apger v. New York Central R. R.*, 310 Mass. 495, 38 N. E. 2d 652.

On the foregoing pages petitioner has outlined the federal question involved herein, and has shown that the decision thereof was necessary to the determination of the case by the state courts, that the question had been presented to each of the state courts which decided it adversely to the petitioner, and that this question of federal law, clearly of the greatest importance, though decided by many state courts in a manner favorable to petitioner, has not yet been settled by this court.

Conclusion.

Petitioner therefore respectfully urges that for the reasons above, this petition for a writ of certiorari directed to the Court of Appeals of the State of New York, should be granted.

GEORGE R. FEARON,
Attorney for Petitioners.

COSTELLO, COONEY & FEARON,
of Counsel,
Office & P. O. Address,
930 University Building,
Syracuse 2, N. Y.

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NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner

JOSEPH CARNICELLI, SEYMOUR WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SADIE WOLFSON, GLORIA WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SAMUEL GREEN, JUNICE GREEN, by SAMUEL GREEN, her Guardian ad Litem, MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits of ELEANOR GULLBERG, deceased, EDWIN L. WOLF, as Administrator of the Goods, Chattels and Credits of RICHARD FRED WOLF, deceased, WILLIS H. GOLDSMITH, as Administrator of the Goods, Chattels and Credits of BETTY MARIE GOLDSMITH, deceased, CLYDE E. BUTLER, as Administrator of HARRY EDWIN BUTLER, deceased, WILLIAM HERBERT, EARL SHOEMAKER, JOSIAH BETHARDS, GEORGE F. LOKER, as Guardian ad Litem of BEATRICE CAROLINE LOKER, GEORGE F. LOKER, JEAN ELIZABETH MATTHEWS, an infant by ETTA H. MATTHEWS, her Guardian ad Litem, and ETTA H. MATTHEWS, BEATRICE KANDEL, an infant by JUDAH KANDEL, her Guardian ad Litem and JUDITH KANDEL, MARY LOU JORGENSEN, an infant by FREDERICK E. JORGENSEN, ESTATE OF DOUGLAS P. WINTERBOURNE, deceased, ESTATE OF JEANNE COSGROVE, deceased, and the following infants, JAMES PRENTICE, RICHARD PHLEGING, ALBERT HANSEN, MADELINE DEPUY, SHIRLEY WISEMAN, RICHARD DONNELLY, MARY JOHNSON, GEORGE McPHILLIPS, LEE HASSAN, AUDREY STILLER, WILLIAM MARSHALL and RICHARD HANSEN,

Defendants.

MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits which were of Eleanor Gullberg, deceased,

Plaintiff-Respondent,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner

PETITIONER'S REPLY BRIEF.

GEORGE R. FEARON,
Attorney for Defendant-Petitioner,
930 University Building,
Syracuse, New York.

F. N. SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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IN THE
Supreme Court of the United States
October Term, 1948
No. 559

AMERICAN FIDELITY & CASUALTY CO., INCORPORATED, and A. CIMPI EXPRESS LINES, INC.,

Plaintiffs-Respondents,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner

JOSEPH CARNICELLI, SEYMOUR WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SADIE WOLFSON, GLORIA WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SAMUEL GREEN, JUNICE GREEN, by SAMUEL GREEN, her Guardian ad Litem, MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits of ELEANOR GULLBERG, deceased, EDWIN L. WOLF, as Administrator of the Goods, Chattels and Credits of RICHARD FRED WOLF, deceased, WILLIS H. GOLDSMITH, as Administrator of the Goods, Chattels and Credits of BETTY MARIE GOLDSMITH, deceased, CLYDE E. BUTLER, as Administrator of HARRY EDWIN BUTLER, deceased, WILLIAM HERBERT, EARL SHOEMAKER, JOSIAH BETHARDS, GEORGE F. LOKER, as Guardian ad Litem of BEATRICE CAROLINE LOKER, GEORGE F. LOKER, JEAN ELIZABETH MATTHEWS, an infant by ETTA H. MATTHEWS, her Guardian ad Litem, and ETTA H. MATTHEWS, BEATRICE KANDEL, an infant by JUDAH KANDEL, her Guardian ad Litem and JUDITH KANDEL, MARY LOU JORGENSEN, an infant by FREDERICK E. JORGENSEN, ESTATE OF DOUGLAS P. WINTERBOURNE, deceased, ESTATE OF JEANNE COSGROVE, deceased, and the following infants, JAMES PRENTICE, RICHARD PHLEGING, ALBERT HANSEN, MADELINE DEPUY, SHIRLEY WISEMAN, RICHARD DONNELLY, MARY JOHNSON, GEORGE McPHILLIPS, LEE HASSAN, AUDREY STILLER, WILLIAM MARSHALL and RICHARD HANSEN,

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Plaintiff-Respondent,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner

PETITIONER'S REPLY BRIEF.

Statement.

Petitioner submits this brief in reply to certain misconstructions of its position, contained in the briefs for respondents Gullberg and A. Cimpi Express Lines, Inc.

POINT I.

Respondents have overlooked the basic premise that decision of the federal question was prerequisite to determination of the questions cited by each of them.

In their respective briefs herein respondents have made light of petitioner's contention that a federal question is involved. Both have completely lost sight of the fact that the federal question was necessarily decided prior to determination of the point which each presents as the main issue of the case.

In the Cimpi brief it is argued that petitioner has abandoned its original position (namely, that at the time of the accident the trailer insured by petitioner was hauled by a tractor not insured by petitioner, that the exclusion clause of the policy providing for just such a situation was effective, and that no liability attached to petitioner) in favor of the federal question stated in the petition. Such is not the case. This is still the basis of petitioner's case. It is the foundation for the federal question. This respondent has apparently lost sight of the sequence of events leading

from this basic fact to the federal question which petitioner asks this Court to decide, namely:

1. Petitioner's policy of insurance contained an exclusion clause providing in substance that it was ineffective unless both tractor and trailer involved in any accident were covered by like insurance with it.

2. This exclusion was a part of the contract between the petitioner-insurer and the insured and operated to restrict the petitioner's liability, unless—

3. The exclusion clause was rendered ineffective;

4. The Court of Appeals rendered this clause ineffective by holding that the policy was a "required policy" under the rules of the Public Service Commission of the State of New York.

This sequence leads directly from the original ground of disclaimer to the present point of argument, namely, that the Public Service Commission had no right to require this policy of a carrier engaged in an interstate operation.

The attorney for respondent Gullberg opens his discussion of this point with a most misleading quotation from the petition (brief of respondent Gullberg, page 9). Obviously petitioner would not expend time, effort and money in asking this Court to review this case, only to concede in opening that the case is not reviewable. Suffice it to say that the three asterisks appearing just before the final sentence quoted represent the better part of two complete paragraphs and that the final sentence quoted refers to a wholly different proposition than that quoted immediately preceding it.

POINT II.

The cases cited in the brief of respondent Gullberg do not preclude review of this decision by this Court.

On this point respondent has cited two distinct lines of decisions of this Court denying review in specific cases.

First are those holding it essential to the jurisdiction of this Court that it appear affirmatively from the record that the federal question was presented to the highest court of the state, was decided by it, and that such decision was necessary to the determination of the cause.

Second are those holding that this Court will not review the decision of a state court if that decision may be adequately supported on a non-federal as well as on a federal ground.

Petitioner disputes neither the existence nor the validity of these rules. On the contrary, petitioner in its petition and brief cited many of these cases and demonstrated why the case at bar conforms to the pattern laid down by the court in those cases for cases subject to review.

To affirmatively appear from the record, it is not necessary that the federal question be stated in so many words as such. It is necessary only that this Court be able to discover from within the pages of the record itself the federal question, its decision, and the necessity of its decision to the determination of the cause.

The application of this rule to the instant case may be outlined as follows:

1. The exclusion clause in the insurance contract would have been effective had not the policy been held a required policy under the New York statute.

2. The policy could not have been a required policy unless the Public Service Commission had the right to require it.

3. The Court of Appeals could not have so held without holding the State Public Service Commission to have the power to impose such a requirement upon the interstate carrier involved.

The decision against insurer-petitioner could rest on no non-federal ground. Only a decision in favor of petitioner could so rest.

To reach its decision against petitioner, the Court had to hold either (1) interstate commerce was not involved (which would be contrary to the fact and would in itself constitute a federal question), or (2) that the New York Public Service Commission had authority to regulate an interstate carrier operating within its territorial jurisdiction to the extent of requiring it to comply with its insurance requirements.

Petitioner has never contended that a carrier may not insure itself against liability in excess of the amounts prescribed either by the Public Service Commission or by the Interstate Commerce Commission. It does contend that insurance in excess of statutory amounts is governed by the terms agreed upon by the insurer and the carrier and not by terms imposed by statute. There is no question but that if the vehicles involved in this accident were the two

vehicles insured by petitioner, used together as provided by the terms of the policy, petitioner would have been bound to pay the judgments to the extent of its policy limits and would have paid them without protest.

Respondent has likewise speculated as to the dire consequences which might follow if petitioner's contention that the carrier was engaged in interstate commerce at the time of the accident is to be sustained. Even though such should ensue (and petitioner sees no reason for believing that they will), petitioner submits that the cases cited in its petition showed unmistakably that this Court has many times declared shipments of the character transported by the carrier on this occasion to be Interstate Commerce, and that regulatory powers of the respective states over such interstate shipments within their borders are limited to those cases wherein neither the Interstate Commerce Commission nor any other federal regulatory body has seen fit to establish regulations such as exist in the instant case.

Respectfully submitted,

GEORGE R. FEARON,
Attorney for Defendant-Petitioner,
Office and P. O. Address,
930 University Building,
Syracuse, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 559

Office - Supreme Court, U.
FILED
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CLERK

AMERICAN FIDELITY & CASUALTY CO., INCORPORATED and A. CIMPI EXPRESS LINES, INC.,

Plaintiffs-Respondents,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

JOSEPH CARNICELLI, SEYMOUR WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SADIE WOLFSON, GLORIA WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SAMUEL GREEN, JUNICE GREEN, by SAMUEL GREEN, her Guardian ad Litem, MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits of ELEANOR GULLBERG, deceased, EDWIN L. WOLF, as Administrator of the Goods, Chattels and Credits of RICHARD FRED WOLF, deceased, WILLIS H. GOLDSMITH, as Administrator of the Goods, Chattels and Credits of BETTY MARIE GOLDSMITH, deceased, CLYDE E. BUTLER, as Administrator of HARRY EDWIN BUTLER, deceased, WILLIAM HERBERT, EARL SHOEMAKER, JOSIAH BETHARDS, GEORGE F. LOKER, as Guardian ad Litem of BEATRICE CAROLINE LOKER, GEORGE F. LOKER, JEAN ELIZABETH MATTHEWS, an infant by ETTA H. MATTHEWS, her Guardian ad Litem, and ETTA H. MATTHEWS, BEATRICE KANDEL, an infant by JUDAH KANDEL, her Guardian ad Litem and JUDITH KANDEL, MARY LOU JORGENSON, an infant by FREDERICK E. JORGENSEN, ESTATE OF DOUGLAS P. WINTERBOURNE, deceased, ESTATE OF JEANNE COSGROVE, deceased, and the following infants, JAMES PRENTICE, RICHARD PHLEGING, ALBERT HANSEN, MADELINE DEPUY, SHIRLEY WISEMAN, RICHARD DONNELLY, MARY JOHNSON, GEORGE McPHILLIPS, LEE HASSAN, AUDREY STILLER, WILLIAM MARSHALL and RICHARD HANSEN,

Defendants.

MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits which were of Eleanor Gullberg, deceased,

Plaintiff-Respondent,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

BRIEF OF RESPONDENT A. CIMPI EXPRESS LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

CHARLES D. LEWIS
Attorney for Respondent,
A. Cimpi Express Lines, Inc.,
175 Main Street,
White Plains, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 559

AMERICAN FIDELITY & CASUALTY CO., INCORPORATED and A. CIMPI EXPRESS LINES, INC.,

Plaintiffs-Respondents,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

JOSEPH CARNICELLI, SEYMOUR WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SADIE WOLFSON, GLORIA WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SAMUEL GREEN, JUNICE GREEN, by SAMUEL GREEN, her Guardian ad Litem, MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits of ELEANOR GULLBERG, deceased, EDWIN L. WOLF, as Administrator of the Goods, Chattels and Credits of RICHARD FRED WOLF, deceased, WILLIS H. GOLDSMITH, as Administrator of the Goods, Chattels and Credits of BETTY MARIE GOLDSMITH, deceased, CLYDE E. BUTLER, as Administrator of HARRY EDWIN BUTLER, deceased, WILLIAM HERBERT, EARL SHOEMAKER, JOSIAH BETHARDS, GEORGE F. LOKER, as Guardian ad Litem of BEATRICE CAROLINE LOKER, GEORGE F. LOKER, JEAN ELIZABETH MATTHEWS, an infant by ETTA H. MATTHEWS, her Guardian ad Litem, and ETTA H. MATTHEWS, BEATRICE KANDEL, an infant by JUDAH KANDEL, her Guardian ad Litem and JUDITH KANDEL, MARY LOU JORGENSON, an infant by FREDERICK E. JORGENSEN, ESTATE OF DOUGLAS P. WINTERBOURNE, deceased, ESTATE OF JEANNE COSGROVE, deceased, and the following infants, JAMES PRENTICE, RICHARD PHLEGING, ALBERT HANSEN, MADELINE DEPUY, SHIRLEY WISEMAN, RICHARD DONNELLY, MARY JOHNSON, GEORGE McPHILLIPS, LEE HASSAN, AUDREY STILLER, WILLIAM MARSHALL and RICHARD HANSEN,

Defendants.

MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits which were of Eleanor Gullberg, deceased,

Plaintiff-Respondent,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

BRIEF OF RESPONDENT A. CIMPI EXPRESS LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

Most of the opinions below are given both on Page 2 of Petitioner's brief and also on Page 2 of Respondent Gullberg's brief and therefore are here referred to and not repeated.

Statement

At the time of this unfortunate accident, out of which these cases arose, A. Cimpi Express Lines, Inc. had in existence two insurance policies. One was with the American Fidelity & Casualty Co., Incorporated with limits of $10,000 to $20,000; the other with New Amsterdam Casualty Company with limits of $50,000 to $100,000. Each of these policies had each been filed with the Public Service Commission of the State of New York as a required policy, and each policy predated the accident.

The New Amsterdam policy was issued October 26th, 1941 and on May 12th, 1942 was extended to cover A. Cimpi Express Lines, Inc., and same was in full force and effect on September 25th, 1942 (the day of accident) the expiration date being October 26th, 1942.

The answer to the complaint was verified by John P. Kenneally, Asst. Sec'y, July 6th, 1943 (fol. 67) and the amended answer verified by the same officer on behalf of New Amsterdam Casualty Company on July 26th, 1943 (fol. 86) and a further amended answer served thereafter.

The New Amsterdam Casualty Company disclaimed while the American Fidelity & Casualty Co., Incorporated defended the actions and also brought an action for a declaratory judgment in which it claimed, in substance, that the policy of the New Amsterdam Casualty Company was not only in full force and effect but also the primary policy and the policy of American Fidelity & Casualty Co.,

Incorporated, was excess. In the meantime, the recoverers by the injured parties and representatives of those who lost their lives exceeded the total limits of both policies and the action of American Fidelity & Casualty Co., Incorporated became academic and the Court permitted a discontinuance of that action but A. Cimpi Express Lines, Inc. continued the action against the New Amsterdam Casualty Company.

Argument

In its petition, Petitioner states on Page 7 that the question presented is "Can the State of New York require of an interstate carrier engaged in an interstate operation, liability insurance in addition to that required by the Interstate Commerce Commission as a prerequisite to the issuance of its certificate to the interstate carrier?".

Significantly, as the record shows, when the New Amsterdam Casualty Company sought to avoid its obligation by disclaiming that was not the point raised at all. The point of disclaimer was upon the ground that the policy did not apply because the tractor used in towing the trailer was not owned by the same party who owned the trailer and that the insurance did not cover both vehicles (fols. 1046-1047). This disclaimer was on February 5th, 1943, at which time the policy was in full force and had an indorsement under 3B of the Public Service Law and on a form known as Company Form No. 6, and no cancellation notice was ever sent to anybody involved (fols. 1030-1032). It is, therefore, apparent that when Petitioner realized the extent of damage and that it might be called upon to pay its limits, it began to seek grounds for avoiding payment even though no such grounds were advanced in the disclaimer.

The statement that the Public Service Commission might require policies in amounts in excess of those now required, as minimum, is without foundation. The minimum amounts

are recited in Petitioner's brief and in no instance do they exceed the amounts required by the Interstate Commerce Commission, and no maximum is named or required. The Public Service Commission could not compel these parties to file for any greater amount. It simply accepted the agreement between the parties as expressed in the policies. There was no attempt on the part of the Public Service Commission to ask for limits higher than the minimum nor was there any attempt to interfere between assured and the insurer's contract.

The only other argument was that the vehicle was engaged in Interstate Commerce. This should hardly be considered. While it is the fact that vehicles commencing and ending an operation within the same State but over a route which takes the vehicles through another state are engaged in Interstate Commerce, the fact remains that that must be the recognized route. It does not apply to a single exception. It only applies to the rule. In this case the carrier maintained its route entirely within the State of New York. On this day it is claimed there was a deviation. By the time the accident occurred the driver had come upon his original route and was proceeding and had been proceeding for several miles within the State of New York. It is not shown or claimed that the route of this carrier was normally anything but Intrastate.

CONCLUSION

It is respectfully urged that the petition be denied.

CHARLES P. LEWIS,
Attorney for Respondent,
A. Cimpi Express Lines, Inc.,
Office & P. O. Address,
175 Main Street,
White Plains, New York.

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In the

Supreme Court of the United States

October Term.

No. 559

New Amsterdam Casualty Company,
Petitioner,

v.

Monroe W. Gullberg, as Administrator, etc., of Eleanor W. Gullberg, deceased.

Brief for Respondent Gullberg, in Opposition to Petition for Writ of Certiorari.

Summary Statement.

The petitioner, New Amsterdam Casualty Company, is seeking a writ of certiorari to the Court of Appeals of the State of New York, in both of the jointly captioned suits, but our presentation here is principally on behalf of the above named Monroe W. Gullberg, as administrator, etc., in the above secondly entitled action only, for the reasons hereinafter explained.

The decision sought to be reviewed was rendered by the Court of Appeals of the State of New York on October 22, 1948, and judgment of affirmance thereon was entered in the office of the Clerk of Orange County, New York,

on October 27, 1948. New Amsterdam Casualty Company (hereinafter referred to as New Amsterdam), as appellant below, moved in the Court of Appeals for re-argument, and, in the alternative, for amendment of the remittitur, but said motion was unanimously denied, by order of said Court of Appeals, entered on November 24, 1948.

This judgment of the Court of Appeals unanimously affirmed the judgment of the Appellate Division below, which, by divided court, had sustained the finding of the Trial Justice, in New York Supreme Court, County of Orange. By said initial judgment, it had been adjudicated that New Amsterdam was liable for the payment of certain judgments, by reason of its motor carrier policy of public liability insurance, covering A. Cimpi Express lines, Inc. The Trial Court expressly found that the policy in question was a statutory "Required Policy," under the provisions of the New York Public Service Law, and that, in consequence, the defenses raised by said insurance carrier could not be maintained.

Opinions Below.

The opinion of the Trial Justice, Hon. Mortimer B. Patterson, was not published in the official New York Reports, but is printed at folios 463-497 of the record below, pages 155 to 166. The majority decision of the Appellate Division, with dissenting opinion of Mr. Justice Haggerty, is reported in 272 App. Div. 1054. The decision of the Court of Appeals, with brief digest by the official reporter, appears in 298 N. Y. 693. There was no opinion by the Court of Appeals, either upon its affirmance of the judgment or its denial of the subsequent motion for re-argument and amendment of remittitur.

Facts.

On September 25, 1942, about 11 P. M. o'clock of a moonlit night, a group of young high school students were riding back from Goshen, New York, to Middletown, New York, on a horse-drawn hay wagon. They had hired the team and wagon from a farmer, and it was being driven by his employee. While the wagon was travelling westerly along Route 17, about one mile west of Goshen, New York, it was struck from the rear by a motor tractor-trailer unit, also west bound, owned by A. Cimpi express Lines, Inc., and operated by its employee, Joseph Carnicelli. The speed of the motor carrier was so great, and the impact so violent, that six of these boys and girls were killed, while many others were injured and maimed. The injured children, by their respective guardians, and the administrators of the deceased, all brought their individual tort actions against Cimpi Express Lines, and there followed the proceedings hereinafter detailed. It goes without saying that no question was raised, nor could now be raised, as to the validity of all the judgments in the initial negligence actions.

At the time of this accident, A. Cimpi Express Lines, Inc., had two policies of public liability insurance, one with American Fidelity & Casualty Co., the other with New Amsterdam Casualty Company. The "American" policy was on file with *both* the Interstate Commerce Commission and the New York Public Service Commission. The "New Amsterdam" policy had been filed only with the Public Service Commission. (It should be noted here that Cimpi Express Lines, a New York firm, was engaged as a motor carrier in *both* intrastate and interstate business, a matter to be discussed more fully in our argument.) American Fidelity eventually conceded that its policy was a "required" policy within the meaning of the applicable New York statute, and liable as such

to the extent of the coverage. New Amsterdam, however, while admitting that its said policy had originally been filed with the Public Service Commission as a "Required Policy," claimed that on September 25, 1942, it had ceased to be such a statutory policy, as to the named insured, A. Cimpi Express Lines, and therefore disclaimed liability, for the reasons set forth in the petitioner's brief.

The plaintiffs, Gullberg, *et al.*, contended that, at the time of the accident, the New Amsterdam policy was in full force and effect as a "Required Policy," covering Cimpi Express Lines under the provisions of the New York Public Service Law, and the rules and regulations of the P.S.C. This was the contention passed upon and sustained by the New York Courts, and we maintain that it was the only decisive, material and necessary issue in the case.

Although the facts passed upon in the combined record below apply equally to both cases captioned upon the petition for writ of certiorari, this brief is submitted only on behalf of the respondent Gullberg, in the second entitled case, for the following reasons: In the action for declaratory judgment brought in New York Supreme Court by American Fidelity (plaintiff-respondent) against New Amsterdam (defendant-appellant), said Monroe W. Gullberg as administrator of the Estate of his deceased daughter, Eleanor Gullberg, was necessarily joined as a co-defendant with all of the parties involved in the tragic accident from which these suits arise. However, only the New Amsterdam appealed in said first captioned suit, and defendants Gullberg, *et al.*, did not join therein. Said action involved, primarily, a dispute between the two insurance carriers covering A. Cimpi Express Lines, as to the liability and priority under their respective policies. In that equity action, Gullberg and the co-defendants were only indirectly concerned. Said questions have now

become largely academic, because of the fact that the aggregate judgments far exceed the total coverage provided by both policies, and because American Fidelity & Casualty Co., conceding its liability under *its* required policy, has paid it over pro rata to all of the judgment-creditors, amounting to 10.467 per cent of the face amount of each judgment aforesaid.

Hence, this brief is expressly on behalf of GULLBERG, as respondent here, in the second entitled action under the joint caption upon the petition for writ. This case, in which GULLBERG was plaintiff-respondent below, against New Amsterdam as defendant-appellant, was made the "test" case for the determination of the rights of all the judgment-creditors herein. Briefly summarized, the procedure in the New York courts was as follows: All of the injured parties, and the legal representatives of the six deceased children, respectively brought their individual negligence actions against A. Cimpi Express Lines, in the Supreme Court of Orange County, New York. Each respectively recovered judgments for damages, by reason of the negligence of Cimpi, the aggregate amount of the original judgments being $157,072.63 (fols. 216-220, 431-435, record below). Executions against Cimpi having been returned unsatisfied, and all of the procedural requirements of the New York statute (Sec. 167, Insurance Law of New York) having been met, all of said judgment-creditors sued New Amsterdam Casualty Company, to enforce payment under its liability policy covering Cimpi. All of said equity actions were tried jointly before Mr. Justice Mortimer B. Patterson in Orange County Supreme Court, resulting in separate judgments in favor of all said plaintiffs against New Amsterdam (October, 1945).

In this proceeding, the Court held that the New Amsterdam policy was a "Required Policy," under the pro-

visions of Article 3-B, New York Public Service Law. Hence, the "exclusion clause" in said policy was held inapplicable, because such policies, under the pertinent New York statute, *must* provide the broad coverage required as (quoting the headline of the statute) "*security for the protection of the public.*" We assume it is unnecessary here to quote Section 63-r of said statute in full, for the reason that it is set forth at pages 7-8 of the petition for writ.

Thereupon, American Fidelity and Casualty Company, having issued a similar policy to Cimpi (with maximum coverage of $20,000) conceded its liability and paid over, pro rata, to each judgment-creditor, as aforesaid. New Amsterdam, however (its policy having maximum limits of $100,000) served notice of appeal upon all of the prevailing plaintiffs. At that point, to shorten the record and simplify proceedings so far as possible, the Gullberg case was made the "test case" in the Appellate Division of New York Supreme Court, as to all the judgment-creditors similarly situated, by formal stipulation. Respondent Gullberg having prevailed in the Appellate Division, a similar stipulation was executed by all parties involved, for the record in the New York Court of Appeals (fols. 1354-1392), continuing the Gullberg case, as decisive of the rights of all other judgment-creditors similarly situated. Thus, in effect, the brief here submitted on behalf of respondent Gullberg, likewise represents the position of the plaintiffs in the twenty-five companion actions, entitled under the aforesaid stipulation.

Of course, the determination by the New York Court of Appeals, affirming the judgment in favor of plaintiff-respondent GULLBERG, also resulted in a finding in favor of A. Cimpi Express Lines, Inc., in the action by said insured against its own insurance carrier, New Amsterdam Casualty Company.

Summary of Argument.

We respectfully submit that the effect and implication of the judgment in question are not nearly so broad and sweeping as the petitioner would have it appear. It is perfectly true, of course, that the decision of the New York Court of Appeals in effect means that a New York statutory "Required Policy," in force under the rules and regulations of the Public Service Commission, should be held answerable for damages arising from such an accident within the State of New York, without regard to whether or not the same carrier also had another required policy of a different insurer, on file with the I.C.C. (In this case, it is purely coincidental that the policy of American Fidelity had been filed for A. Cimpi Express Lines with both the I.C.C. and P.S.C.) That, however, does not justify the petitioner's broader conclusion that the Court below thus held that the New York Public Service Commission has "the power to impose insurance requirements upon this interstate motor carrier over and above the insurance requirements specifically prescribed by the Interstate Commerce Commission" (quoting from page 15, Petitioner's brief). The generalizations which the petitioner thus strives to present under the caption on page 7 of its brief, and further at page 15, *et seq.*, are broader than the case warrants, and are not in accord with the applicable law. It seems, indeed, far-fetched for the petitioner to say that this decision is "fraught with dangers which, if * * * permitted to stand, may well impair the regulatory powers of the United States over interstate commerce * * *." On the other hand, if the argument of petitioner were carried to its logical conclusion, there might, indeed, be grave danger to the public, if such a motor carrier were not permitted to protect against liability with more than one policy, when operating both interstate and intrastate.

As we shall point out, the federal statute itself recognizes, and makes provision for, the regulation by each state of motor carriers operating on the highways within its own boundaries.

The respondent contends that the real question in issue here does not involve the interpretation of any federal statute, nor does it infringe upon any constitutional rights. It is merely this: Was the New Amsterdam policy a statutory "Required Policy" under the provision of the New York law, and answerable as such for this accident which occurred within the State of New York?

It is obvious that the New York court could, and did, pass upon this question, without infringing upon the jurisdiction of the I.C.C. over the motor carrier or insurer. It is true that the Cimpi truck, on its return trip from New York City to Auburn, New York, detoured into the State of New Jersey, for the purpose of picking up the remainder of a shipment of war materials, under emergency order for the U. S. Naval Base at Sampson, New York (fols. 917-918). Thus, as an abstract proposition, the return trip became "interstate" in character. This, however, did not nullify the policy, which by its very terms permitted operations outside the State of New York (Exhibit 1, Vol. 2, p. 21). Nor did it divest the New York Public Service Commission of its control over said motor carrier, "for the protection of the public," after he returned within the State of New York.

It was proper for the New York courts to treat as immaterial the allegations of New Amsterdam as to interstate commerce, because that question was not necessarily involved in the determination of the case. This subject is amplified under the following Point I.

POINT I.

None of the pertinent issues below required determination of a federal question.

The material questions of the case were entirely within the province and sphere of the New York Court. We entirely agree with the following quoted portions of petitioner's brief (pp. 5-6):

> "The crux of this case, therefore, is whether or not petitioner's policy of insurance constituted a 'required policy' for A. Cimpi Express Lines, Inc., under the Public Service Law of the State of New York, at the time of the accident. If it was such a 'required policy,' the above quoted exclusion was rendered inapplicable by the statute. If, as petitioner contends, it was not such a 'required policy' at that time, the exclusion would be effective and no liability could be imposed upon petitioner. * * * The adverse decision of the Court of Appeals of the State of New York on that point is, of course, not reviewable by this Court."

What, then, remains in the case which this Court should properly be asked to determine? The petitioner seeks to show that the New York Court necessarily found thereby that the P.S.C. had powers to supersede the jurisdiction of the I.C.C. This conclusion, respondent contends, is untenable, for the following reasons:

In the first place, A. Cimpi Express Lines was, and is, a New York firm, having its principal place of business and main garage at Auburn, New York. There is no dispute as to the fact that this motor carrier operated intrastate, as well as interstate. It was licensed for intrastate operation under the provisions of the Public Service

Law of New York, and held a permit for such operation under the rules and regulations of the P.S.C. Necessarily, this required said carrier to file and maintain the statutory required policy with the P.S.C. Nowhere in the statute itself, and certainly not from any sound reason of public policy, does it appear that such motor carrier shall have *only* the *minimum* insurance coverage. By the same token, there is nothing to prevent such carrier from maintaining as many policies, and in such amount, as it deems fit and proper, for its protection, and the protection of the public. There appears no sound reason for the petitioner to argue that such a carrier is restricted to insurance *only* in the *minimum* amount required, either under P.S.C. or I.C.C. regulations.

It is obvious that the P.S.C. had control over Cimpi as an intrastate operator, regardless of whether or not this carrier also operated interstate. The P.S.C. requirements are *independent of, not in addition to,* the I.C.C. requirements. The contractual relationship under the policy, as between the insurance carrier and the beneficiaries thereof, was not changed by the interstate character of the particular trip in question. The insurance carrier writing this policy could have put such a clause in the contract, but did not. It is well settled that such policies must be construed most strongly against the insurer.

Furthermore, it clearly appears from the Federal statute, and the cases interpretative thereof, that the Interstate Commerce Commission recognized the concurrent control and rights of the P.S.C., as to motor carriers operating within the boundaries of its own State. The accident in question did happen in the State of New York and the Public Service Commission of the State of New York had jurisdiction, and the laws of New York apply, regardless of whether or not the regulations of the Interstate Commerce Commission concurrently applied. Chapter 8, In-

terstate Commerce Act, Part II; Motor Carriers, as amended September 18, 1940 (being Title 49, United States Code Annotated, Sections 301, *et seq.*), clearly indicates that the jurisdiction of the I.C.C. is not exclusive, and that individual State Law is preserved thereunder. We quote from said Act as follows:

> "SEC. 302:
>
> "(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

The U. S. Supreme Court has upheld the validity of State statutes which overlap, though they do not contradict the Federal Motor Carrier Act. In *Maurer vs. Hamilton* (1940), 309 U. S. at page 598, we find:

> "As a matter of statutory construction, Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especially the case when public safety and health are concerned. * * *"

To the same effect is *Eicholz vs. Public Service Comm.* (1939), 306 U. S. 268, and we quote therefrom (p. 274) as follows:

> "Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation." (citing cases.) * * * "That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid.

> See *Lone Star Gas Co. vs. Texas*, 304 U. S. 224, 238, 82 L. ed. 1304, 1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected" (citing additional cases).

And further:

> "The validity of the requirement of such a certificate to promote the proper and safe use of the State highways is not open to question. * * *"

If it could be said that a policy such as this becomes suspended and ineffective, every time that a New York carrier left the State of New York, even though he has an accident in the State of New York while on his way home, confusion and chaos would result. Familiar illustrations may be drawn from analogous situations, in interstate commerce, viz.: For example, the average railroad carrier is clearly under the jurisdiction of the I.C.C. Nevertheless, it is familiar and well settled law that the Public Service Commission of any state retains jurisdiction for certain purposes over such carrier, e. g.: The State has a right to exact franchise taxes from such a railroad, for the use and maintenance of public crossings. It has a right to enact and enforce its own regulations as to speed in certain zones, maintenance of signals, crossing protection and similar matters concerned with the safety and protection of the public. Surely, Congress never intended to divest the States of all control over an interstate carrier, for all purposes. The case here presented is obviously one of those established exceptions.

The home and place of business of A. Cimpi Express Lines, Inc. (the insured owner), was at Auburn, N. Y. Its tractors and trailers, including the vehicle in question,

were regularly garaged and maintained there (fols. 851, 857). The round trip, of which this particular operation was a part, was from Auburn to New York City (fols. 851, 857, 858), and returning to Auburn. True, the accident interrupted the return to the home garage, but it is perfectly obvious that Carnicelli was directly on his way home, by the shortest route, via Route 17 to Binghamton, and thence to Auburn (fols. 858, 859). This route, running through Seneca Falls, would mean only a slight deviation to deliver the navy materials at Sampson Naval Base, picked up on the return trip under the War Emergency rulings (fols. 581-585, 830-831; Plaintiff's Exhibit 12). The slight detour via Newark, returning from Brooklyn, does not alter the fact that the vehicle, at the time of the accident, was on its most direct route home, and (to use the language of P.S.C., Form 4) was then and there being operated "within the boundaries of the State of New York." The accident, it is conceded, occurred about a mile west of Goshen, New York, on Route 17 (fols. 576-577). This point is at least 25 miles within the State of New York, from the point where the Cimpi vehicle had re-entered New York, after detouring into New Jersey.

Distinguishing the Cases Cited by Petitioner

In *Central Greyhound Lines vs. Mealey*, 334 U. S. 653 (1947), New York State was seeking to tax the *total* receipts from motor transportation, of which nearly 43 per cent of the mileage routes lay in New Jersey and Pennsylvania. As was said in the prevailing opinion of the United States Supreme Court: "We are not dealing with a necessary deviation, or a calculated detour." And further, this Court said: "The tax may be fairly apportioned to the business done within the State by a fair method of apportionment." Hence, this case clearly recognizes the proper retention of control by a State over traffic within its boundaries.

McGoldrick vs. Gulf Oil Company, 309 U. S. 414 (1940), dealt with the State power to tax imports in *foreign* commerce, holding that such must be treated as a "duty" under the Tariff Act of 1930. Hence, we submit that this case is not analogous to ours.

New York Central Railroad Co. vs. Winfield, 244 U. S. 147, dealt with the compensation for an injured railroad employee engaged in interstate commerce. There the Federal Employers Liability Act applied, to the complete exclusion of the State Workmen's Compensation Law. In that instance, no room was left for the application of state compensation law. In other words, the "statutory purpose" there was clearly mandatory and exclusive.

If the inferences sought to be drawn by petitioner were carried to the ultimate conclusion, it might as well be said that, once a motor carrier unit had left the State, when it returns thereto the State can no longer have any control or regulation over such a vehicle, nor say what highways it shall use, at what speed it shall travel, or what regulations it shall observe. When we remember that the statute in question is one designed primarily "for the protection of the public," it should be obvious that it definitely falls within the class reserved to the jurisdiction of the State.

It would make a chaotic and uncertain state of affairs, if the inferences sought to be raised by the petitioner were adopted. For instance, let us picture the following illustration: Assume a New York motor carrier, doing no regular interstate business requiring him to have an I.C.C. certificate and insurance thereunder, holds a New York P.S.C. permit, with the *required policy* filed thereon. Assume, further (as in our case), that his said insurance policy is expressly endorsed to permit occasional trips into neighboring states. Suppose, now, that he leaves the State of New York, makes a delivery in

New Jersey, and then, on his homeward route, causes an accident within the State of New York, when almost home. Technically, and in the abstract, his operation took on the character of interstate commerce. Whereupon, his insurance carrier might say: "That was an interstate trip. We filed our policy only in connection with your New York State permit. The P.S.C. has no jurisdiction over interstate commerce; *ergo,* we disclaim any liability." Such reasoning would not only be fallacious, but would emasculate and defeat the very purpose of the New York Public Service Law, in particular the aforesaid section which is designed *for the protection of the public.*

POINT II.

The judgment in question is not one properly subject to review by this Court.

We venture to suggest that the affirmative defenses as to interstate commerce, raised by New Amsterdam in its answer below, were specious, sham and frivolous, injected solely for the purpose of lending to the case the color of a Federal question. As such, they were properly overruled by the State Court.

In its final motion to the New York Court of Appeals, seeking for re-argument of the appeal, the petitioner also moved, in the alternative,

> "(b) for an order recalling the remittitur herein and amending the same by adding thereto substantially the following:
>
> "A question under the Federal Constitution was presented and passed upon by this Court, namely, whether Article 3-B of the Public Service Law of the State of New York, as construed by the Supreme Court and the Appellate Division of the Supreme

> Court, is repugnant to the interstate commerce provision of the Federal Constitution, Article I, Section 8. * * *"

This application was denied by said Court of Appeals, without opinion.

The United States Supreme Court may not undertake to review the decision of a State Court, unless it affirmatively appears from the record, not only that the federal question involved was presented to the highest State Court having jurisdiction, but that its decision of the federal question was necessary to determination of the cause.

> *Honeyman vs. Hanan*, 300 U. S. 14 (1937), appeal dismissed 302 U. S. 375.
> *Southwestern Bell Telephone Co. vs. State of Oklahoma*, 303 U. S. 206 (1938).

Where the judgment sought to be reviewed may rest upon two grounds, one of which is Federal and the other non-Federal in character, the United States Court's jurisdiction fails if the non-Federal ground is independent of the Federal ground and adequate to support the judgment.

> *Fox Film Corp. vs. Muller*, 296 U. S. 207 (1935).
> *St. Louis S. W. R. R. vs. City of Tyler*, 212 U. S. 552 (1908).
> *Kansas City Star vs. Julian*, 215 U. S. 589 (1909).
> *Ward vs. Board of Com's'rs*, 253 U. S. 17 (1920).
> *McCoy vs. Shaw*, 277 U. S. 302 (1928).

Whitney vs. People of California, 274 U. S. 357 (1927), at page 360:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court" (followed by citations).

To the same effect are:

Mellon vs. O'Neil, 275 U. S. 212 (1927).

Lynch, et al., vs. N. Y. ex rel. Pierson, 293 U. S. 53 (1934), quoting from pages 54-55:

> "It is essential to the jurisdiction of this court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *DeSaussure vs. Gaillard,* 127 U. S. 216, 2[illegible] 32 L. ed. 125, 132, 8 S. Ct. 1053; *Johnson vs. Risk,* 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; *Walter A. Wood Mowing & Reaping Mach. Co. vs. Skinner,* 139 U. S. 293, 295, 297, 35 L. ed. 193-197, 11 S. Ct. 528; *Eustis vs. Bolles,* 150 U. S. 361, 366, 367, 37 L. ed. 1111, 1112, 14 S. Ct. 131; *Whitney vs. California,* 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1098, 1099, 47 S. Ct. 641; *Mellon vs. O'Neil,* 275 U. S. 212, 214, 72 L. ed. 245, 246, 48 S. Ct. 62. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. *Allen vs. Arguimbau,* 198 U. S. 149, 154, 155, 49 L. ed. 990, 993, 25 S. Ct. 622; *Johnson vs. Risk,* 137 U. S. 300, 34 L. ed. 683, 11 S. Ct. 111, *supra*; *Walter A. Wood Mowing & Reaping Mach. Co. vs. Skinner,* 139 U. S. 293, 35 L. ed. 193, 11 S. Ct. 528, *supra*; *Consolidated Turnp. Co. vs. Norfolk & O. V. R. Co.,* 228 U. S. 596, 599, 57 L. ed. 982, 983, 33 S. Ct. 605; *Cuyahoga River Power Co. vs. Northern Realty Co.,* 244 U. S. 300, 302, 304, 61 L. ed. 1153, 1157, 1158, 37 S. Ct. 643."

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE F. ROESCH, 2ND,
Attorney for Respondent Gullberg,
90 North Street,
Middletown, New York.